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Supreme Court, U.S.
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No. 09-522

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2010

RICHARD V. NOVAK AND PATRICIA NOVAK

Petitioners

TARA J. JABLONSKI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL L. JABLONSKI, DECEASED

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Should this Court define "Judicial Admissions" for due process purposes?

LIST OF PARTIES

All parties have been listed in the caption hereto.

CORPORATE DISCLOSURE

This document is not subject to any provisions of Supreme Court Rule 29.6

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CITATIONS OF REPORTS BELOW

The Opinion of the Supreme Court of Pennsylvania was filed on July 29, 2009 (App A). The Opinion of the Superior Court of Pennsylvania was filed on July 2, 2008 (App B). The Opinion of the Court of Common Pleas of Lancaster County Pennsylvania (App C) was filed on May 1, 2007.

BASIS FOR THIS COURT'S JURISDICTION

The judgment of the Supreme Court of Pennsylvania upholding the July 2, 2008 Opinion of the Superior Court of Pennsylvania was filed on July 29, 2009. This Courts jurisdiction is invoked based upon U.S. S. Ct. Rule 10 (c) and (b).

CONSTITUTIONAL PROVISIONS INVOLVED

The 5th Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows:

"No person....shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The 14th Amendment to the U.S. Constitution is also implicated in this case. It states in pertinent part as follows:

"Section 1... nor shall any State deprive any person of life, liberty, or property, without due process of law".

STATEMENT OF THE CASE

Petitioner Richard V. Novak was involved in a tragic automobile accident which occurred on August 30, 2001. The Jablonski Respondents filed a complaint on March 3, 2003, in which Richard was sued in a wrongful death and survivor action in the Court of Common Pleas of Lancaster County, Pennsylvania. Previously, criminal charges had been filed against Richard for the death of Michael L. Jablonski.

In the criminal proceeding a preliminary hearing (the equivalent of a probable cause hearing) was held before one of Pennsylvania's District Magistrates. Richard Novak did not testify at that hearing, nor did he testify at any time in any of the criminal proceedings against him.

Novak's criminal attorney, during argument before the local magistrate, made a number of statements during oral argument that were taken down as part of the proceedings.

As part of Novak's pre-trial motions before the Court of Common Pleas he filed a Petition for Writ of Habeous Corpus on the theory that the state had, at best, made out a case for simple negligence, and that the information upon which the state based its prosecution did not rise to a level of reckless or intentional misconduct necessary to support criminal charges. Defendant

Novak's motion was granted in the criminal case and the charges were dismissed.

In the civil case that followed Novak gave a deposition. In his deposition he testified that he was not inattentive. His testimony factually contradicted the observation as to his being inattentive and or negligent which his attorney argued was the extent of what the government had shown, if at all, at the preliminary hearing.

Procedurally, in the civil case, Novak's civil attorney unsuccessfully sought to introduce and use evidence, particularly Novak's testimonial evidence, to confront and defeat the Jablonski evidence that Novak was in fact negligent. Jablonski, by largely relying on the words of Novak's criminal lawyer made during oral argument, was successful in having Novak's criminal lawyer's words adjudicated judicial admissions. Novak also filed a motion in limine to prevent the use of his criminal attorney's words during argument, against him, in the civil case. It was denied.

The Lancaster County trial court granted Plaintiffs/Respondent's motion that the comments made by Novak's criminal attorney during argument at the preliminary hearing stage were judicial admissions and denied Defendant/Petitioner's motion in limine as to his civil attorney's argument that these words were mere argument and should not be used against Novak' in the civil case. The trial court not only denied Novak's motion in limine which would have resulted in the jury deciding whether Novak

was negligent but charged the jury on a directed verdict that Novak not only caused the accident but was negligent. The jury only considered damages and held Novak responsible for over 2 million dollars in damages. During the civil trial Novak was not permitted to rebut the liability claims and his criminal attorneys' comments in the previous criminal case were permitted to be used against him.

Novak raised his due process objections during the trial and the pretrial process in the form of objections to the trial courts directed verdict decisions and the denial of Novak's motion in limine.

Before Pennsylvania's Supreme Court Novak also argued that he was denied a fair trial because the issue decided by the trial court in the criminal matter was whether he intentionally caused the accident and "negligence was not even an element of the offense he was charged with by the Commonwealth". Brief of Appellant (Novak) before the Superior Court of Pennsylvania. In Novak's motion for a rehearing en banc before the Superior Court when appealing from that Court's July 2, 2008 Opinion, he argued that, "Because of the purported judicial admissions" of liability, the trial court improperly denied Novak of his "day in court" and usurped the jury's role as sole fact finder".

In his Petition for Allowance of Appeal to the Pennsylvania Supreme Court Novak argued as follows"

"In this case, the Superior Court Panel's interpretation of the law as to "judicial admissions" is inconsistent with, and contrary to, well established precedent and resulted in Defendants being deprived of the opportunity and right to defend themselves against allegations of negligence". Petition for Allowance of Appeal, page 14.

REASONS FOR GRANTING THE WRIT

In the underlying criminal case Petitioner Richard Novak did not, pursuant to his attorney's advice, testify or actively participate in his criminal case. His attorney made an argument during his preliminary hearing however during which he argued that the third degree felony charges Richard Novak faced were unsupported by the necessary intentional or reckless component as the criminal law required.

At the pre-trial phase Richard Novak succeeded in having the charges dismissed. The Habeous Corpus petition his lawyer filed was successful based upon the states failure to carry its burden to demonstrate that Richard exhibited intentional or reckless behavior.

During the criminal prosecution the Respondents initiated a civil action. During the civil action the arguments made by Richard Novak's criminal attorney were admitted against Richards's interest as "judicial admissions" and he was directed not to contest these judicial admissions before the jury. The jury was given a

directed verdict, and consequently deliberated only on damages returning a verdict of over $2,000, 000.00 against Richard and his wife.

Richard's criminal attorney's comments were not discernable as factual admissions in any clear or unequivocal way. They were, Richard's attorney properly argued, albeit unsuccessfully, plainly and simply opinion and observations on the government's charges against Novak.

Indeed Richard testified in his own deposition in his civil case that he was not inattentive, a position that conflicted with his attorney's argument in his criminal case, that at best, Richard's misconduct, if any, did not rise to the requisite intentional or reckless level.

The appellate courts of Pennsylvania decided the civil case below in violation of its own law. See *John Conomos, Inc. vs. Sun Co., 831 A. 2d 696 (Pa. Super 2003), appeal denied, 845 A.2d 818 (Pa. 2004)*. But that is not of course, why this Court should grant the writ.

The due process implications and the precedent set by Pennsylvania is of enormous importance. Further, the circuits are not consistent on this issue.

There is no federal law or body of law defining what "judicial admissions" are, nor what if any, limitations apply to them.

There are a large number of state opinions and federal court opinions at both the district court, and appeal court levels, applying state law.

Virtually none of these cases address the due process implications of attorney's arguments from a proceeding or related criminal case arising in a subsequent and related civil case. None of these cases address the legal malpractice, insurance implications, nor the chilling effect that an arbitrary and capricious plethora of varying cases and policies have on the pre-eminent concerns of the 5th Amendment and criminal defense.

Novak's civil attorney, in his "Concise Statement of the Reasons Relied upon for Allowance of Appeal", states as follows on page 14 of his appeal.

"In this case, the Superior Court panel's interpretation of the law as to "judicial admissions" is inconsistent, and contrary to, well-established precedent and resulted in defendants (Novak) being deprived of the opportunity and right to defend themselves against allegations of negligence. This Court should accept review in order to clarify or re0emphasize the important of statements of fact needing to be unequivocal and clear in order to be considered "judicial admissions". Otherwise, litigants are deprived of the right to have their "day in court" simple because of arguments made in other proceedings."

Ensconced in counsels entreaty to Pennsylvanian's Supreme Court are enormous due process of law related issues, both as to life (and personal liberty) and to an accused citizen's interest and, or, rights in property, let alone the obvious procedural due process implications. It

must be remembered that Richard did not plead guilty, nor was he convicted of anything. Merely because his criminal attorney made an artful and successful argument that Richard exhibited no intentional or reckless misconduct, Richard was punished, as a matter of law, by suffering a directed verdict which has deprived him of all the property and savings he had accumulated during his entire life. These purported admissions of his attorney have likewise deprived his wife, for other reasons, (a "partnership" interpretation) of all that she has worked to achieve. Although this Court has far more important policy and appellate tasks to address than Richards personal travails, this Pennsylvania decision is far more ominous. No insurance company, no criminal defendants, no criminal defendants attorney, indeed, the entire criminal defense bar, lacking any standard to which they can relate or upon which they can rely to guide them as to the parameters of judicial admissions in like circumstances, let alone state to state, are forced to alter and depress their advocacy in defense of their clients particularly when making mens rea arguments in criminal cases.

The circuits are grossly in consistent on this issue and this Courts guidance, in the interest of justice is needed.

See *Bower v. O'Hara et al. 759 F.2d 1117, 1126 (3d Cir 1985)*. Under *Bower* a guilty conviction appears to have preclusive effect, giving rise to an estoppel. However, a plea of nolo contender or even guilty does not. In the case at hand, "judicial

admissions" which had preclusive effects, were based upon the comments of counsel made during argument. They were never litigated. How, or why, should matters not even be reviewed in cursory fashion be used to bar litigating the issue of a parties responsibility in a subsequent legal proceeding. The attorneys remarks even had the effect of binding, through another ruling (on a partnership issue) a totally uninvolved (factually) third person (Novak's wife and business). On the other hand as a common example of inconsistency, *See State Farm Mut. Auto, Inc. Co. v. Worthington, 405 F.2d 683 688 (8th Cir 1968)*. Its holding, and the holding of the Supreme Court of *Missouri in Nichole v. Blake, 418 S.W. 2d 188 (1967)*.

The law of judicial admissions is in total disarray. The Circuits (applying State law) are all over the map. In a day of highly developed interstate commerce this is not a desirable state of attairs. In nation whose due process standards are the cornerstone of both our criminal and civil justice system the present state of confusion and inconsistency from state to state and among the Circuits as to what defines a "judicial admission" in the situations described above need and deserve the attention of this Court.

CONCULSION

Based upon the aforegoing Petitioner respectfully requests that this Court issue the Writ.

APPENDIX "A"
OPINION OF SUPREME COURT OF PA

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TARA J. JABLONSKI,
INDIVIDUALLY
AND AS ADMINISTRATRIX
OF THE ESTATE OF MICHAEL
L. JABLONSKI,
Deceased

No. 647 MAL 2008

Petition for
Allowance of
Appeal from the
Order of the
Superior Court

RICHARD V. NOVAK
AND PATRICIA NOVAK

Petitioners

ORDER

PER CURIAM:

AND NOW, this 29th day of July, 2009, the Petition for Allowance of Appeal is DENIED.

TRUE & CORRECT COPY
ATTEST: July 29, 2009

_____
Elizabeth Zisk, Chief Clerk

APPENDIX "B"
OPINION OF SUPERIOR COURT

J. A06014/08

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

TARA L. JABLONSKI, INDIVIDUALLY IN THE And as ADMINISTRATRIX of the ESTATE Of MICHAEL L. JABLONSKI, Deceased	:	IN THE SUPERIOR COURT OF PA
Appellee	:	
v.	:	
RICHARD V. NOVAK and PATRICIA NOVAK	:	No. 491MDA2007
Appellants	:	

Appeal from the Order docketed
February 28, 2007,
Court of Common Pleas, Lancaster County,
Civil Division at No. CI-03-01733

BEFORE: FORD ELLIOTT, P.J., DONAHUE, and POPOVICH, JJ.

MEMORANDUM: FILED: July 2, 2008

Richard Novak ("Mr. Novak") and Patricia Novak ("Mrs. Novak") (collectively "the Novaks"), husband and wife, appeal the February 28, 2007 order denying their post-trial motion filed following a $2.08 million jury verdict against them and in favor of Tara Jablonski ("Jablonski"). This appeal, which raises several allegations of trial court error, arises out of a civil action for damages brought by Jablonski against the Novaks under Pennsylvania's Wrongful Death and Survival Acts.[1] After careful review, we affirm.

J. A06014/08

The facts and procedural history of this case were summarized by the trial court as follows:

On April 30, 2001, Plaintiff's decedent Michael L. Jablonski, a PennDOT employee, was working on a traffic sign on the side of Route 41 in Lancaster County. Defendant Richard V. Novak was returning from a tomato delivery in New Jersey. At approximately 9:45 a.m., Richard Novak caused a vehicle accident which resulted in Jablonski's death. At the time of his death, Jablonski was 33 years old, had been married to Tara Jablonski for almost nine years and had two young children.

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[1] 42 Pa.C.S.A. §§ 8301 and 8302, respectively.

Richard Novak was married to Patricia Novak and they had ten children whom Patricia Novak home-schooled. Essentially, the Novak's had a farming business, Novak's Greenhouses, the primary focus of which was growing and distributing tomatoes. Together, Richard and Patricia Novak owned two properties, both of which were used for the business. The property on Donnerville Road, at which the Novak's lived, housed two greenhouses. The property on Anchor Road was used predominately for the business, but was also used to grow some vegetables for private use.

Patricia Novak testified that she ran the school year from summer to early spring so she and the children were available to help on the farm during the busy season. She also stated that, while the children are paid for their help on the farm, she does not draw a salary for her work. Instead, the profits from the business are placed into a joint checking account she holds with Richard Novak. Patricia Novak occasionally wrote checks on behalf of the business from that joint checking account, but testified that the total checks she wrote constituted less than ten percent of the total checks written. The Novaks never had a written partnership agreement.

Defendant Richard Novak was prosecuted criminally for the accident. At the criminal preliminary hearing, his attorney made several statements acknowledging Novak's inattentiveness which caused the accident.

A jury trial was held on June 20 and 21, 2006 after which the jury awarded Plaintiff $33,000.00 for the Wrongful Death action and $1,750,000.00 for the Survival action. Defendants filed a post-trial motion on July 3, 2006. After the transcripts were ordered and transcribed, Defendants filed the accompanying brief on September 18, 2006. Plaintiff thereafter responded to the post-trial motion on October 27, 2006. Defendants replied on November 3, 2006 and oral argument was held before this Court on December 12, 2006. Defendant's Post-Trial Motions were denied on February 28, 2007. This appeal followed.
Trial Court Opinion, 5/01/07, at 1-3.

On appeal, the Novak's present several issues for our review. They argue that the trial court committed reversible error in the following ways: (1) by denying their motion to preclude statements made by Mr. Novak's criminal defense attorney at his preliminary hearing in the prior criminal proceeding, and for directing a verdict in favor of Jablonski as to liability at the subsequent civil trial based on those statements; (2) by denying their motion *in limine* to preclude evidence regarding Mr. Novak's operation of a vehicle with suspended license; and (3) by denying their motion *in limine* requesting bifurcation of their civil trial into two separate phases for compensatory and punitive damages. The Novaks also contend that the jury's verdict was against the weight of the evidence as related to the issue of the existence of a partnership, and that the trial court committed reversible error by

failing to grant their motion for a directed verdict because Jablonski failed to specifically name the partnership in the caption of her civil complaint. Appellant's Brief at 6. We affirm and address each of these issues in turn.

Statements Made by Mr. Novak's Attorney in Prior Criminal Proceeding

Prior to the commencement of the civil action underlying this appeal, the Commonwealth brought criminal charges against Mr. Novak under 75 Pa.C.S.A § 3742.1 for causing Mr. Jablonski's death while driving with a suspended license. At Mr. Novak's preliminary hearing on January 30, 2002, his defense attorney, J. Richard Gray, Esquire ("Attorney Gray"), contended that although Mr. Novak had caused the accident and had been "inattentive" and "careless", his conduct did not rise to the level of recklessness or intentional conduct required to convict him under Section 3742.1. The trial court granted Mr. Novak's subsequent petition for writ of *habeas corpus* and motion to quash criminal information, determining that Mr. Novak's conduct constituted "mere negligence." Trial Court Opinion, 12/18/03, at 14. The criminal charges were subsequently dropped.

Jablonski then initiated the civil action underlying the present appeal. Prior to trial, the Novaks filed a motion *in limine* to exclude Attorney Gray's statements in the criminal case. The trial court denied the motion, finding that Attorney Gray's statements were judicial admissions. At trial, Jablonski entered Attorney

Gray's admissions into evidence and the trial court then granted Jablonski's motion for a directed verdict as to liability. The trial court instructed the jury that the only issues requiring resolution were (1) whether a partnership existed, and (2) the amount of damages to be awarded Jablonski.

The Novaks argue that the trial court erred in denying their motion *in limine* and granting the directed verdict as to liability. When assessing the propriety of a ruling on a motion *in limine*, we apply the standard applicable to the particular evidentiary matter under consideration. Bugosh v. Allen Refractories Co., 932 A.2d 901, 913-14 (Pa. Super. 2007), citing *Delpopolo v. Nemetz*, 710 a.2d 92, 94 (Pa. Super. 1998). "The admission or exclusion of evidence is a decision subject to the discretion of the trial court whose decision will not be disturbed absent a clear abuse of that discretion, or an error of law." *Id.* at 914, *citing* Campbell v. Attanasio, 862 A.2d 1282, 1288-89 (Pa. Super. 2004). An abuse of discretion is more than a mere error of judgment and requires either an overriding or misapplication of existing law, or an exercise of judgment that is manifestly unreasonable or the product of partiality, prejudice, bias or ill will. Stumpf v. Nye, --- A.2d ---, 2008 WL 2252587, *3 (Pa. Super. 2008), *citing* Geise v. Nationwide Life and Annuity Co. of America, 939 A.2d 409, 417 (Pa. Super. 2007).

Judicial admissions are formal admissions that have the effect of withdrawing a fact from issue and deciding it without the need for proof of that fact. Gibbs v. Herman, 714 A.2d 432, 437 (Pa. Super. 1998), *citing* Durkin v. Equine Clinics, Inc., 546 A.2d 665, 670 (Pa. Super. 1988). Judicial admissions may be made by a party or his attorney, are deemed true, and cannot be contradicted by the admitting party. John B. Conomos, Inc. v. Sun Co., Inc. (R&M), 831 A.2d 696, 712 (Pa. Super. 2003), *citing* Nasim v. Shamrock Welding Supply Co., 563 A.2d 1266, 1267 (Pa. Super. 1989), and Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58, 69 (1989). Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof. Id. at 713, *citing* Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972).

In the present case, Attorney Gray made several dispositive *factual* statements at Mr. Novak's preliminary hearing:

"The question I would submit for the Court is whether he defendant

caused an accident. Now this taken in simple terms, *he did, of course,*

cause an accident." N.T., 1/30/02, at 79 (emphasis added).

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"Now, the conduct that the Commonwealth has provided for the defendant through their expert and other witnesses is inattentiveness.

He was inattentive." Id. at 81 (emphasis added).

***

"I would submit, judge, the Commonwealth by the very fact they charged the defendant with careless driving shows his acts weren't reckless.

They were careless." Id. at 82-83 (emphasis added).

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"It isn't a gross deviation from the standard of conduct that a person, reasonable person would observe in his situation. *It is exactly what they said it was. Inattentiveness. He was inattentive. He was distracted looked back and all of a sudden the vehicle was there and it was too late for him to do anything.*" Id. at 83 (emphasis added).

Based on the foregoing, the record supports the trial court's finding that Attorney Gray's statements were clear and unequivocal statements of fact admitting his client's negligence, and were therefore judicial admissions as to the factual issue.

As to the propriety of the directed verdict on liability, we note that when deciding whether to grant a motion for a directed verdict, the trial court must consider the facts in the light most favorable to the non-moving party, accept as true all evidence which supports that party's contention, and reject all adverse testimony. *Geise*, 939 A.2d at 426, *citing* Faherty v. Gracias, *874 A.2d 1239, 1246 (Pa. Super. 2005)*. A directed verdict may be granted only where the facts are

clear and there is no room for doubt. Id. On review, an appellate court may reverse only when it is established that the trial court committed an error of law or abused its discretion. Id.

In this case, Attorney Gray's judicial admissions left no doubt as to Mr. Novak's liability and made it clear that Mr. Jablonski's death was caused by Mr. Novak's liability and made it clear that Mr. Jablonski's death was caused by Mr. Novak's negligence. Accordingly, we find no error in the trial court's grant of a directed verdict in favor of Jablonski as to liability.

Admission of Evidence of Mr. Novak's Operation of Vehicle without Driver's License

The Novaks next argue that the trial court erred in denying their motion *in limine* to preclude evidence regarding Mr. Novak's driving with a suspended license. Specifically, they contend that this information biased the jury against them and led to a non-objective assessment of the remaining issues of the existence of a partnership and damages.

In this case, Jablonski initially sought punitive damages against the Novaks. Prior to trial, the Novaks filed a motion in limine to preclude evidence of the suspended license, which was denied. At trial, Jablonski's attorney advised the jury during his opening argument that on the day of the accident, Mr. Novak was driving without a license. N.T., 6/20/06, at 5-6, 8. The only evidence adduced at trial in relation to the suspension was a statement made by an investigating police

officer, who testified that Mr. Novak was driving with a suspended license on the day of the accident.[2] Id. at 42. In a turn of events that the trial court could not have foreseen when ruling on the motion in limine, at the close of the plaintiff's case-in-chief, Jablonski withdrew her claim for punitive damages. As a result, the trial judge specifically instructed the jury that the punitive damages claim had been withdrawn and that the jury was not to impose punitive damages upon Mr. Novak. N.T., 6/21/06, at 111. The trial judge also accurately explained that the purpose of awarding compensatory damages was not to punish a defendant or reward a plaintiff, but instead to compensate the plaintiff for any damages the jurors found had been sustained.[3] The jury subsequently awarded a total verdict of $2.08 million to Jablonski, $330,000 for the wrongful death action and $1.75 million for the survival action. The latter figure was within the range of

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[2] Q: And during your course of the investigation, did you discover whether Mr. Novak had a revoked driver's license on the day of the accident?

A: His license was suspended the day of the accident.
N.T., 6/20/06, at 42

[3] The trial judge's instruction to the jury as follows:

Mr. Jablonski's net earning capacity as projected by the plaintiff's economic expert, without taking into consideration the non-economic damages that the jury was entitled to award.[4]

We find no abuse of discretion by the trial court. First, the record does not support a conclusion or inference that the jury was biased by the references to Mr. Novak's license suspension. The details of the suspension were not discussed at trial and the jury awarded damages within the range of the uncontested economic loss proven through Jablonski's economic expert. Therefore, any suggestion that the jury's award of compensatory damages was the result of bias is purely

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The amount you award today must compensate the plaintiffs completely for damage sustained in the past as well as damage the plaintiffs will sustain in the future. Damages may not exceed compensation for compensable loss of damages. And damages should be awarded with the least burden to the wrongdoer consistent with the idea of fair compensation to an injured party. The purpose of awarding compensatory monetary damages is not to punish a defendant or reward a plaintiff, but rather the purpose is to

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[4] The plaintiff's economic expert testified that Mr. Jablonski's net earning capacity plus the value of his services to his family totaled between $1,592,000 and approximately $2.1 million. N.T. 6/20/06, at 76.

fairly compensate the plaintiff for any damages which you find have been sustained. Now, there was reference, I believe, at one point that there was a claim for punitive damages but that has been eliminated from this case. It's compensable damages only that you're concerned with. And that's something that is a fair compensation for the loss of damages sustained.

N.T., 6/21/06, at 111

J. A06014/8

Finally, the trial judge clearly instructed the jury that it was only to award compensatory damages. The law presumes that a jury follows the court's instructions. *See Paves v. Corson, 569 Pa. 171, 178, 801 A.2d 546, 550 (2002), citing Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663, 672 (1992).*

We find that the trial court did not abuse its discretion in denying the motion *in limine* prior to trial while a claim for punitive damages was pending. Further, given the *de minimus* mention of the license suspension and the lack of any evidence that Mr. Novak was in any way prejudiced by it, we conclude that even if there was any error by the trial court, it was harmless. The harmless error doctrine underlies every decision to grant or deny a new trial, and a moving party must demonstrate to the trial court that he or she has suffered prejudice in or to obtain a new trial. *Drum v. Shaull Equipment and Supply Co., 787 A.2d 1050, 1059 (Pa. Super. 2001),*

citing Harman v. Borah, 562 Pa. 455, 467, 756 A.2d 1116, 1122 (2000).

Denial of Request for Bifurcation of Trial

Next, the Novaks contend that the trial court erred in denying their pre-trial motion *in limine* requesting bifurcation of the trial to address compensatory and punitive damages separately. The Novaks argue, *inter alia*, that the court's failure to bifurcate the trial led to inadmissible and prejudicial evidence (e.g., Mr. Novak's license suspension) being presented to the jury.

A trial court may bifurcate a trial pursuant to Rule 213(b) of the Pennsylvania Rules of Civil Procedure, which provides:

The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues. Pa. R.C.P. 213(b). "The decision whether to bifurcate [a trial] is entrusted to the sound discretion of the trial court, which is the best position to evaluate the necessity for such measures." Gallager v. Pennsylvania Liquor Control Bd., 584 Pa. 362, 374, 883 A.2d 550, 557 (2005). A trial court's decision with regard to whether to bifurcate a trial will not be disturbed absent an abuse of discretion. Brian v. Brian, 872 A.2d 843, 845 (Pa. Super. 2005).

Based upon a review of the record, except for evidence regarding the suspended license, a separate trial on compensatory damages would

have been a look-alike to a trial on the punitive damages issue, thus wasting judicial resources. Likewise, the Novaks' sole argument of prejudice resulting from the trial court's refusal to bifurcate was the allowance of evidence at trial of Mr. Novak's license suspension. For the same reasons supporting our affirmance of the trial court's decision on that point, we find no error by the trial court in deciding not to bifurcate the Novaks' trial. There is no evidence of record that demonstrates that the trial court abused its discretion in making its ruling.

Verdict Against the Weight of the Evidence on the Issue of the Existence of a Partnership

The Novaks also contend that the jury's verdict was against the weight of evidence on the issue of whether a partnership existed between them in the ownership of the business that operated as Novak's Greenhouse. Our standard of review for weight of evidence claims is well-settled:

> A new trial will be granted on the grounds that the verdict is against the weight of the evidence 'only where the verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail... [The appellant] is not entitled to a new trial where the evidence is conflicting and the [finder of fact] could have decided either way.'

Watson v. American Home Assur. Co., 685 A.2d 194,198 (Pa. Super. 1996), quoting Gottfried v.

American Can Co., 489 A.2d 222, 225 (Pa. Super. 1985).

The Pennsylvania Uniform Partnership Act ("the Act") defines a partnership as "an association of two or more persons to carry on as co-owners for a business profit." 15 Pa.C.S.A. §831(a). Co-ownership of a business and the sharing of profits are fundamental attributes of a partnership.[5] Buckl v. Buckl, 542 A.2d 65,67 (Pa. Super. 1988); see also Northhampton Brewery Corporation v. Lande, 10 A.2d 583, 584 (*Pa. Super. 1939)* (holding that "the difference between a tenancy of the entireties and a partnership conducted by husband and wife as partners is that the partnership involves, in addition to co-ownership of property, the element of carrying on a business or commercial enterprise for profit"). It is well-established that a written agreement is not necessary to establish a partnership; the existence of a partnership may be implied after considering all attending facts and circumstances. Gohen v. Gravelle, 411 Pa. 520, 522-23, 192 a.2d 414, 416 (1963) citing Pappas v. Klutinoty, 383 Pa. 184,118

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[5] The mere fact that property is owned jointly does not, in and of itself, establish a partnership. *See* 15 Pa.C.S.A. § 8312(2) ("Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property or part ownership does not of itself establish a partnership whether or not the co-owners share any profits made by the use of the property.")

A.2d 202 (1955), and Mattei v. Masci, 351 Pa. 93, 40 A.2d 265 (1945).

The Act provides that the sharing of business profits is *prima facie* evidence of participation in a partnership, unless such profits fall within one of five enumerated categories.[6] See 15 Pa.C.S.A. § 8312(4). When evidence of profit (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if the profits were received in payment:

(i) As a debt by installments or otherwise.

sharing and co-ownership is presented, it becomes the burden of the defense to rebut with evidence that there was no profit sharing or that a partnership did not exist. *See DeMarchis v. D'Amico, 637 A.2d 1029, 1034 (Pa. Super. 1994).* This Court has previously found that husbands and wives can be partners. *See Vacco v. Marcus, 485 A.2d 506 (Pa. Super. 1984);*[7] *Northampton Brewery,*

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[6] **§ 8312. Rules for determining the existence of a partnership**

In determining whether a partnership exits, these rules shall apply:

[7] In *Vacco*, this Court found that a bar/restaurant located on property owned jointly by a husband and wife, whose liquor license and fictitious name were registered in both of their names, and whose profits were shared by both parties, was a partnership under the Act. The husband in that case, however, admitted that his wife "managed

supra.[8] The Act holds partners jointly responsible for the wrongful act of either partner toward a third party:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefore

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> (ii) As wage of any employee or rent to a landlord.
> (iii) As an annuity to a surviving spouse or representative of a deceased partner.
> (iv) As interest on a loan though the amount of payment varied with the profits of the business.

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the money" and "kept all the books" for the bar's daytime operations. *Vacco, 485 A.2d at 508*.

[8] In *Northampton Brewery*, this Court held that a restaurant operated on property leased by a husband and wife who shared a joint bank account and received no salary for their participation in the business; whose liquor license and corporate name were registered in both of their names, was a partnership *despite the husband claiming sole ownership of the business.*

(v) As the consideration for the sale of the goodwill of a business or other property by installments or otherwise.

15 Pa. C.S.A. § 8312(4).

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to the same extent as the partner so acting or omitting to act.

15 Pa.C.S.A. § 8325.

The record amply supports the jury's conclusion that Mr. and Mrs. Novak were partners in the ownership and operation of Novak's Greenhouse:

- Mrs. Novak owned two properties with her husband that were used in the greenhouse business, N.T., 6/21/06, at 9-10, 19-20;

- The Novaks took out loans in both of their names for the purchase of business properties, *Id*. at 19-20;

- Mrs. Novak actively worked in the business three months a year and part-time the rest of the year, and also worked at a retail stand that the business operated, *Id*. at 16, 22;

- The profits from the greenhouse business were put into a joint checking account maintained by

- Richard Novak and Patricia Novak, as husband and wife, Id. at 11;

- The Novaks both wrote checks from the joint account and shared the profits of the business, Id. at 11, 16, 32-34;

- The Novaks wrote checks from the joint account for both business and personal purposes, Id. at 13-14, 25;

- Mrs. Novak signed several checks payable to her children for the work that the children did for Novak's Greenhouse, Id. at 15-16;

- Mrs. Novak, unlike her children, was not compensated for her work at the greenhouse or at the retail business stand, Id. at 16-17, 22;

- The Novaks filed a joint income tax return, Id. at 28;

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- The business which operated on Donnerville Road was paid for from the Novaks' joint checking account, *Id.* at 35;

- Mrs. Novak dealt with the marketing of the flowers while Mr. Novak dealt with the tomato business, Id. at 61;

- The Novaks each maintained assets in their individual capacities and thus understood that they could keep their funds separate if they so chose, Id. at 21, 42-43;

- Between 1998 and 2001, Mrs. Novak wrote 46 checks dealing with taxes for the business compared to only six checks by Mr. Novak, Id. at 4-5 (testimony of Michael Ryan); and

- Mrs. Novak wrote 58 percent of the business checks during that time period, Id. at 7 (testimony of Michael Ryan).

While it is true that the Novaks denied being partners and presented evidence to rebut the presumption raised by Jablonski's evidence of profit sharing,[9] the jury chose not to accept the

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[9] Mrs. Novak testified that she had never entered into a written partnership agreement with her husband to operate Novak's Greenhouse and that her husband was the owner and operator of Novak's Greenhouse and made all business decisions. N.T., 6/21/06, at 26-27. She also testified that her husband individually applied for a sales

conclusion urged by the Novaks that they were not partners. It is well settled that it is up to the jury to decide credibility issues and in doing so, it can accept some, all or none of the evidence presented. *See* Odata v. Fullen, 848 A.2d 964, 966 (Pa. Super. 2004), citing Neison v. Hines, 539 Pa. 516, 520, 653 A.2d 634, 637 (1995).

The Novaks cite to Burkholder v. Cherry, 607 A.2d 745 (Pa. Super. 1992), to support the lack of a partnership here. In Burkholder, this Court held that there was no partnership where a husband and wife had a joint checking account and the wife was seen at the job site occasionally. Unlike in Burkholder, however, there was more in the present case than mere evidence of a joint checking account and occasional visits by a wife to a job site. Mrs. Novak testified that she actively worked in Novak's Greenhouse during the "busy season," and this "busy season" was in fact the only time during the year when the Greenhouse was actively operated. Further, both Novaks testified that the proceeds from Novak's Greenhouse were deposited into a joint checking

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tax license, that her name never appeared on the schedule for Profit or Loss from Farming on their joint tax return, and that her husband individually negotiated and entered into contracts with customers. Id. at 29-30. Mr. Novak confirmed this testimony and added that they did not file a partnership tax return and that he alone applied for the business licenses for Novak's Greenhouse. Id. at 38-39.

account that was not just for personal use, but from which all business expenses and employees were paid. As such, this case is clearly distinguishable from *Burkholder*.

In the case *sub judice*, after hearing all of the testimony and evidence, the jury found that the Novaks were partners and returned a verdict against both Mr. Novak and Mrs. Novak.[10] Taking evidence as a whole, we find the jury's determination factually supported by the record. Mrs. Novak fully participated in the operation of the business during the months it was actively operated, wrote checks on behalf of the business, had a joint checking account with her husband into which the proceeds of the business were deposited, and did not receive a salary for her efforts. Nothing in the verdict shocks our sense of justice, and we therefore deny the Novaks' claim.

Denial of Directed Verdict due to Jablonski's Failure to Name Partnership in Caption of Complaint

Finally, the Novaks contend that they were entitled to a judgment notwithstanding the verdict ("JNOV") because the trial court erred in failing to direct a verdict in their favor due to Jablonski's failure to name the Novaks' alleged partnership in

---

[10] The jurors were individually polled, and each of the twelve jurors stated that he or she agreed a partnership existed.

the caption of her complaint.[11] In support of this argument, the Novaks cite to Pa.R.C.P. 2128(a), which provides that "[a]n action against a partnership may be prosecuted against one or more partners as individuals trading as the partnership in the manner designated by Rule 2127(a) or against the partnership in its firm name." Pa.R.C.P. 2127(a) in turn provides that the proper manner of designation is "A, B and C trading as X & Co."

Our rules of civil procedure do not strictly require the name or existence of the partnership be set forth in the caption to the action. To the contrary, this Court has held that the partnership designation may be ascertained from the caption of the case, the allegations in the complaint, or both. Livingood v. Charles F. Luppold, Inc., 175 A.2d 354, 356 (Pa. Super. 1961) ("The statements in the caption *and the complaint* that the defendants were 'doing business' as Fourth and Penn Diner is a clear indication that they were not merely owners of the business as tenants by the entireties or otherwise, or that they were merely

---

[11] JNOV can be entered only if the movant is entitled to judgment as a matter of law or if evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. Griffin v. University of Pittsburgh Medical Center-Braddock Hosp. --- a.2d ---, 2008 WL 2081527, *2 (Pa. Super. 2008) citing Buckley v. Exodus Transit & Storage Corp., 714 A.2d 298, 304-05 (Pa. Super. 1999).

sharing the profits of the business, but that they were carrying on the business for profit, and were partners.") (citations omitted and emphasis added).

In this case, although the caption did not include a "trading as" or "doing business as" designation, the allegations of the Complaint left no doubt that the Novaks were being sued as partners in a business for profit. Specifically, the Complaint: (1) listed both Novaks as defendants and states that they are "co-owners of a business" and "share profits from that business," Complaint, ¶¶ 11-13; (2) identified the Novaks "as *partners* and/or joint venture' and claims they "are each liable for any wrongful act of the other," *id.* at ¶ 16; (3) averred that four enumerated circumstances supported the existence of a joint venture, *id.* at ¶ 15; and (4) contended that "Mrs. Novak, as a partner and/or joint venture of Mr. Novak, is liable for any wrongful act of Mr. Novak committed during the ordinary course of their mutual business," *id.* at ¶ 35. Indeed, the Novaks demonstrated their clear understanding that they were being sued in their capacities as partners in partnership by repeatedly denying the existence of a partnership or joint venture throughout their Answer and New Matter. Answer and New Matter, ¶ 13-16, 35, 38-41.

Because the detailed allegations in the Complaint unquestionably put the Novaks on notice that the action was being prosecuted against them as partners in a for-profit business venture, we conclude that there was no clear

violation of Pa.R.C.P. 2128(a). As a result, the trial court did not err in refusing to grant JNOV in the Novaks' favor. Cf. Palkovitz v. Second Federal Savings and Loan, 412 Pa. 547, 195 A.2d 347, 349 (1963) (holding that partnership property was subject to execution even though judgment entered against all partners individually without mention of partnership name); Reed B. Coyle Co. v. DeLullo, 187, A.2d 296 (Pa. Super. 1962) (same).

Order affirmed.
Judgment Entered:

_____
Deputy Prothonotary

Date:_____

APPENDIX "C"
OPINION OF COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

TARA L. JABLONSKI, Individually and as Administratrix of the Estate of MICHAEL L. JABLONSKI deceased Plaintiffs,	:	
v.	:	No. CI-03-01733
RICHARD V. NOVAK and PATRICIA NOVAK Defendants	:	

OPINION

BY: ALLISON, J.

May 1, 2007

This opinion is written following a jury trial held before this Court on June 20 and June 21, 2006 and an order issued on February 28, 2007 entering judgment in favor of Plaintiff. Defendants thereafter filed an appeal to the Superior Court.

This opinion is written pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

BACKGROUND

On April 30th, 2001, Plaintiff's decedent Michael L. Jablonski, a Penn DOT employee, was working on traffic sign on the side of Route 41 in Lancaster County. Defendant Richard V. Novak was returning from a tomato delivery in New Jersey. At approximately 9:45 a.m., Richard Novak caused a vehicle accident which resulted in Jablonski's death. At the time of his death, Jablonski was 33 years old, had been married to Tara Jablonski for almost nine years and had to young children.

Richard Novak was married to Patricia Novak and they had ten children whom Patricia Novak home-schooled. Essentially, the Novaks had a farming business, Novak's Greenhouse, the primary focus of which was growing and distributing tomatoes. Together, Richard and Patricia Novak owned two properties, both of which were used for the business. The property on Donnerville Road, at which the Novaks lived, housed two greenhouses. The property on Anchor Road was used predominately for business, but was also used to grow some vegetables for private use.

Patricia Novak testified that she ran the school year from summer to early spring so she and the children were available to help on the farm during the busy season. She also stated that, while the children are paid for their help on the

farm, she does not draw a salary for her work. Instead, the profits from the business are placed into a joint checking account she holds with Richard Novak. Patricia Novak occasionally wrote checks on behalf of the business from that joint checking account, but testified that the total checks she wrote constituted less than ten percent of the total checks written. The Novaks never had a written partnership agreement.

Defendant Richard Novak was prosecuted criminally for the accident. At the criminal preliminary hearing, his attorney made several statements acknowledging Novak's inattentiveness which caused the accident.

A jury trial was held on June 20 and 21, 2006 after which the jury awarded Plaintiff $33,000.00 for the Wrongful Death action and $1,750,000.00 for the Survival action. Defendants filed a post-trial motion on July 3, 2006. After the transcripts were ordered and transcribed, Defendants filed the accompanying brief on September 18, 2006. Plaintiff thereafter responded to the post-trial motion on October 27, 2006. Defendants replied on November 3, 2006 and oral argument was held before this Court on December 12, 2006. Defendants' Post-Trial Motions were denied on February 28, 2007. This appeal followed.

DISCUSSION

In their appeal, Defendants first allege this Court erred in failing to grant Defendants' Motion for Directed Verdict on the issue of whether suit was filed against the Defendants as partners when

Plaintiff only filed suit against Defendants in their individual capacities.

The Court first notes that Defendants waived this issue by not raising it until the time of trial. Rule 2128(a) of the Pennsylvania Rules of Civil Procedure states that "[a]n action against a partnership may be prosecuted against one or more partners as individuals trading as the partnership in the manner designated by Rule 2127(a), or against the partnership in its firm name." Rule 2127(a) states, in pertinent part, that a party shall prosecute in action "in the names of then partners trading in the firm name, in the following manner: 'A, B and C trading as X & Co.'." Further, Rule 1028, which governs Preliminary Objections, permits preliminary objections alleging "failure of a pleading to conform to law or rule of court." Pa.R.C.P 1028(a)(2). Moreover, Rule 1028(b) mandates that all preliminary objections be raised at the same time.

In the instant case, the caption indicates the Defendants are Richard V. Novak and Patricia Novak. The complaint, however, clearly indicates Plaintiff was suing Defendants both as individuals as well as partners. Specifically, paragraph 11 through 16 state unambiguously Plaintiff's intent. In fact, in their Answer, Defendants even deny that Defendants are partners. See Defendant's Answer and New Matter, paragraph 16. Defendants were, therefore, on notice of exactly who was being sued and the proper vehicle for

the relief now requested would have been a preliminary objection under Rule 2128(a).

Defendants assert that *Curtin v. Martin* supports their position that where two defendants are named individually, the plaintiff may not proceed in an action against the partnership. *Curtin v. Martin*, 6 Chest. 253 (C.P. Chester County, Pa 1954). While the *Curtin* court does make that conclusion, Defendants ignore the procedural posture of that case. In *Curtin*, the complaining party raised the caption issue as a preliminary objection under Rule 2128(a). Therefore, finding that the caption was improper, the court sustained the preliminary objection and struck the cause of action against the partnership. Conversely, Defendants in the case at bar did not raise the issue until the trial when they moved for a non-suit in favor of Patricia Novak. Had Defendants similarly raised the issue in a preliminary objection, the result may have been different. However, they did not, and, therefore, the argument is waived.

Even if Defendants had not waived the issue, they would, nonetheless, be without recourse. Defendants assert that, by denying their motion for directed verdict, the Court allowed the cause of action to proceed against the partnership, a new party to the action, in violation of the statute of limitations. However, as stated above, the complaint made it obvious that the action was brought against the Novaks as individuals and as partners in a business. Therefore, Defendants were on notice of the

cause of action and were not prejudiced in any way in presenting a defense to the partnership claim.

Defendants' next claim is that the Court erred by directing a verdict against Defendant Richard Novak and by not precluding prior statements made by Defendant Richard Novak's attorney in a prior criminal proceeding. The Courts have consistently held that an attorney, when acting within the scope of his authority, may bind his client by a statement made. *Lee v. Safeguard Mut. Ins. Co.*, 379 Pa. Super. 104, 119, 549 A.2d 927, 934 (1988).

A judicial admission is an express waiver made in court or preparatory to trial by a party or his attorney, conceding for the purposes of the trial, the truth of the admission. It has the effect of a confessor pleading, in that the fact is thereafter to be taken for granted, so that the opposing party need offer no evidence to prove it and the party by whom the statement was made is not allowed to disprove it. It is axiomatic that a judicial admission cannot be contradicted by the party that made it. Jewelcor Jewelers and Distributors v. Corr, 373 Pa. Super 536, 542, A.2d 72, 75 (1988) (internal citations omitted).

During a preliminary hearing addressing Defendant Richard Novak's criminal culpability, Novak's attorney argued that Novak was "inattentive" and "careless" while driving but that his actions were not criminal. Defendant asserts that the comments made during the preliminary hearing were not clear, unequivocal admissions of

fact and are therefore not judicial admissions. Clearly, the attorney's and Mr. Novak's objective during the preliminary hearing was to avoid criminal liability. Novak is bound by those statements and cannot now ask the court to disregard the statements made by his attorney during the preliminary hearing. Those statements and the evidence which had been elicited was clearly sufficient to support the entry of directed verdict.

Defendants' next contention is that the verdict was against the weight of the evidence as it related to the existence of a partnership between Defendants Richard and Patricia Novak. A verdict is against the weight of the evidence only if "the evidence supporting the verdict is so inherently improbably or at variance with admitted on proven facts or with ordinary experience as to render the verdict shocking to the court's sense of justice." Rittenhouse v. Hanks, 777 A.2d 1113, 1119 (Pa. Super. 2001).

Partnerships in Pennsylvania may be express or implied. *See* Pappas v. Klutinoty, 383 Pa. 184, 187, 118 A.2d 202, 204 (1955). The Pennsylvania Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners of a business for profit." 15 Pa.C.S.§8311(a). It is well settled that simply co-owning property or sharing profits is insufficient to create a partnership. 15 Pa.C.S.§8312. However, §8312(4) states that "[t]he receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business." *See*

also DeMarchis v. D'Amico, 432 Pa. Super. 152, 162, 637 A.2d 1029, 1034 (1994). Further, Pennsylvania law allows for husband and wife to be partners in a business. Northampton Brewery Corp v. Lande, 138 Pa. Super 235, 239, 10 A.2d 583, 585 (1939).

Here, while there was no express partnership, the jury found the Novaks to be involved in an implied one. It is true, as Defendants allege, that merely holding the business properties as tenants by the entireties is insufficient to constitute partnership. Plaintiff established *prima facie* evidence of a partnership by demonstrating that the Novaks owned two properties that are used in the business and that the profits from the business were put into a joint checking account maintained by Richard Novak and Patricia Novak as husband and wife. In addition, Plaintiff proved that both Richard and Patricia Novak wrote and signed checks from the joint checking account, some of which were payable to her children for the work the children did for the business. Plaintiff also showed that Patricia actively worked for the business three months of the year and part-time for the remainder of the year and was not compensated for her work. Based on the evidence presented at trial, the Court respectfully suggests there was ample evidence for the jury to conclude that the Novaks were partners in Novak's Greenhouse.

Defendants' fourth contention is that the Court committed reversible error in denying the Motion in Limine to preclude testimony or

evidence that Defendant Richard Novak was driving with a suspended license. The court notes that "[q]uestions concerning the admission or exclusion of evidence are within the sound discretion of the trial court and will not be disturbed absent a clear indication that discretion has been abused." Henry v. McCrudden, 133 Pa. Cmwlth. 231, 235, 575 A.2d 666, 668 (1990).

The court denied the Motion in Limine, believing that the evidence was relevant to Plaintiff's punitive damage claim. Plaintiff, however, dropped the punitive damage claim after the evidence had been introduced at trial. The Court later instructed the jury on what it was to base its damage award and certainly did not mention the fact that Novak was driving that day without a valid license. Clearly, the court's instruction cured any potential problem resulting from the introduction of the evidence.

Defendants' last allegation is that the Court erred by denying Defendants' Motion to Bifurcate the Plaintiff's claim for Compensatory Damages from its claim for Punitive Damages. Defendant asserts that by not bifurcating the claims, the evidence of Defendant Richard Novak's suspended license was admitted and prejudiced the jury. The decision to grant or deny a bifurcation motion lies within the sound discretion of the trial court. Wolk v. Wolk, 318 Pa. Super. 311, 318, 464 A.2d 1359, 1362 (1983).

Here, Defendants were not prejudiced by the Court's decision to deny the Motion to Bifurcate. The evidence of Defendant Richard

Novak's suspended license was only referenced one time during testimony when Trooper Yvette Guenther testified that his license was suspended. In addition, the amount awarded by the jury ($1,750,000.00) was actually on the low end of the Plaintiff's economic expert report, further showing that the jury was not inflamed by the evidence.

For the aforementioned reasons, this Court respectfully suggests Defendants' appeal should be denied.

BY THE COURT:

PAUL K. ALLISON

JUDGE

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No. 09-522

Supreme Court, U.S.
FILED
NOV 24 2009
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

RICHARD V. NOVAK AND
PATRICIA NOVAK,
Petitioners,

v.

TARA J. JABLONSKI, INDIVIDUALLY
AND AS ADMINISTRATRIX OF THE
ESTATE OF MICHAEL L. JABLONSKI,
DECEASED,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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RESPONDENT'S BRIEF IN OPPOSITION

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CERTIFICATION OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that Respondent's Brief in Opposition to Petition for Writ of Certiorari contains 1,569 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 24, 2009.

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CERTIFICATE OF SERVICE

In compliance with Supreme Court Rule 29.5(b), I certify that I have today caused to be served, by depositing with Fed Ex, for Standard Overnight Delivery, postage pre-paid, three true and correct copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari on all parties required to be served, as follows:

Don Bailey, Esquire
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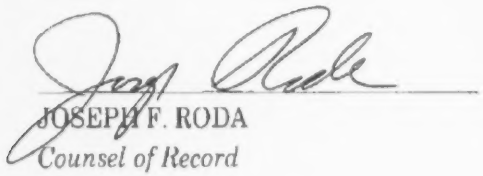

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DATED: November 24, 2009

QUESTION PRESENTED

Whether this Court should provide a definition of "judicial admissions" that must be applied by all state and federal courts, when Petitioner did not raise this issue in the courts below, and instead argued before the Supreme Court of Pennsylvania that the law on "judicial admissions" is "well-settled."

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BASIS FOR JURISDICTION IN THIS COURT

Petitioner's attempt to invoke the jurisdiction of this Court under Supreme Court Rules 10(b) and 10(c) is improper because Petitioner did not raise any issues of federal law in the courts below; the pertinent questions raised below instead related only to how to apply a well-settled state law.

STATEMENT OF THE CASE

This wrongful death and survival action arose from the April 30, 2001[1] death of Michael Jablonski, a thirty-three year-old husband and father of three. Petitioner Richard Novak struck and killed Mr. Jablonski with his truck when Mr. Jablonski was working on a traffic sign on the side of the road for the Pennsylvania Department of Transportation ("PennDOT"). (Record 306a-307a). Mr. Novak was driving with a suspended license. (Record 88a, at 42:12-16).

After the accident, the Commonwealth of Pennsylvania brought criminal charges against Mr. Novak under 75 Pa. C.S.A. § 3742.1: "Accidents involving death or personal injury while not properly licensed." (Record 302a).

During a preliminary hearing on January 30, 2002, Mr. Novak's criminal defense attorney opposed this charge by arguing that Mr. Novak had caused the accident by being "distracted," "inattentive" and

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[1] Petitioner has incorrectly stated on page two of his petition that the accident occurred on August 30, 2001.

"careless," and not by acting "recklessly" or "intentionally," which was required for criminal conviction. (Record 299a). His counsel said:

- "The question I would submit for the Court is whether the defendant caused an accident. Now, this taken in simple terms, **he did, of course, cause an accident.**" (Record 298a, at 79:19-22) (emphasis added).

- "Now, the conduct that the Commonwealth has provided for the defendant through their expert and other witnesses is inattentiveness. **He was inattentive.**" (Record 299a, at 81:21-23) (emphasis added).

- "I would submit, judge, the Commonwealth by the very fact they charged the defendant with careless driving shows his acts weren't reckless. **They were careless.**" (Record 299a, at 82:24-83:2) (emphasis added).

- "It is exactly what they said it was. Inattentiveness. **He was inattentive. He was distracted,** looked back and all of a sudden the vehicle was there and it was too late for him to do anything." (Record 299a, at 83:15-18) (emphasis added).

After the preliminary hearing, Mr. Novak's counsel filed a Motion to Quash Information/Petition for Writ of Habeas Corpus and stipulated that the

court should consider the entire preliminary hearing transcript. (Record 303a-304a). After reviewing the transcript, the court ruled that Mr. Novak's actions "constitute[d] mere negligence" (Record 315a), and dismissed the criminal charges. (Record 316a).

At the subsequent civil trial, the trial court deemed the above-quoted statements of Mr. Novak's criminal defense attorney to be judicial admissions. (Record 90a, at 50:16-52:13). Since those judicial admissions left no doubt that Mr. Novak's negligence caused Mr. Jablonski's death, the trial court precluded the submission of contradictory evidence (Record 103a-104a, at 3:12-7:9), and entered a directed verdict as to liability. (Record 124a, at 11:14-12:2).

There would have been no contradictory evidence to present, in any event, because despite what Mr. Novak has claimed on pages three and six of his petition, he did not contrarily testify in his deposition in the civil case that he had not been inattentive. Rather, Mr. Novak testified in his deposition that he took his eyes off the road, and by the time he looked back in front of him and realized the car in front of him had stopped, he could not stop in time. (Respondent Appendix A, at 9-13).[2] Mr. Novak hit the car in front of him, and then crushed Mr. Jablonski between the bumpers of his truck and

---

[2] At the instruction of Mr. Baker from the United States Supreme Court, Respondent has included in her Appendices only the pertinent excerpts from the materials that were filed in the lower courts but were not included in the Reproduced Record from the Pennsylvania Superior Court proceedings.

the PennDOT vehicle that had been parked behind Mr. Jablonski, cutting Mr. Jablonski in half. (Id.)

Also contrary to what Mr. Novak has claimed in his petition, he did not preserve the issue that he is currently attempting to raise before this court.

Mr. Novak's current petition essentially argues that this Court needs to define "judicial admissions" because the current body of law is inadequate. In the courts below, however, Mr. Novak adopted Pennsylvania's definition of "judicial admissions," without criticizing that definition in any way. His arguments instead centered on his contention that the preliminary hearing statements by his criminal defense attorney did not meet that definition. His argument was so limited in:

- the motion *in limine* that he and his wife filed before trial, seeking to preclude the admission of the statements of Mr. Novak's attorney from the prior criminal case. (Record 64a-66a).

- the motion for post-trial relief that he and his wife filed. (Record 183a-186a; Record 253a-254a).

- the appeal that he and his wife filed with the Superior Court of Pennsylvania. (Respondent Appendix B, at 14-24).

- the petition for *en banc* reargument that he and his wife filed with the Superior Court of Pennsylvania. (Respondent Appendix C, at 25-34).

- The Petition for Allowance of Appeal that he and his wife filed with the Supreme Court of Pennsylvania. (Respondent Appendix D, at 35-45).

In fact, in the petition that Mr. and Mrs. Novak filed with the Supreme Court of Pennsylvania, they said the definition of judicial admissions was "well-established law in [that] jurisdiction." (Respondent Appendix D, at 36).

SUMMARY OF THE ARGUMENT

This Court should deny the Petition for Writ of Certiorari because Petitioner has failed to preserve the single issue raised in his petition before any of the courts below.

Independent of this, the petition should be denied because Petitioner has failed to justify stripping the states of their long-standing power to define and apply their own well-established laws relating to "judicial admissions."

ARGUMENT

Congress has given the United States Supreme Court the power to review "[f]inal

judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." *Howell v. Mississippi,* 543 U.S. 440, 443 (2005), *rehearing denied,* 544 U.S. 944 (2005) (quoting 28 U.S.C. § 1257(a)(emphasis added)).

Because of this statute and the statutes that preceded it, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review.'" *Id.* (quoting *Adams v. Robertson,* 520 U.S. 83, 86 (1997)).

In *Howell,* as here, the petitioner failed to cite any cases from the United States Supreme Court, the Federal Constitution, or any cases directly construing the Federal Constitution, in the relevant portion of the argument in his State Supreme Court brief. *Id.* As a result, this Court dismissed the writ of certiorari that had already been granted as improvidently granted. *Id.* at 443-446. *See also Adams,* 520 U.S. at 87-91 (rejecting writ because of failure to preserve issue below).

This Court should similarly reject the petition for writ of certiorari that has been filed here, given that Petitioner raised in the courts below only issues of how to apply well-established Pennsylvania state law, without mentioning the federal question he has attempted to raise here.

Lest Petitioner suggest that his issue is so important that it justifies review by this Court,

regardless of his failure to preserve the issue below, this Court has already rejected such an argument in *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001). In so ruling, this Court noted that "the importance of an issue should not distort the principles that control the exercise of our jurisdiction." *Id.*

This Court continued: "[B]y adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicary process." *Id.* (quoting *Adams*, 520 U.S. at 92 n.6). This Court added that this would "ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition." *Id.* at 110-111 (citation omitted).

Likewise, in *Adams*, this Court explained that "'it would be unseemly in our dual system to government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." 520 U.S. at 90 (citation omitted). In so ruling, this Court was preserving a state's "undeniable interest in having the opportunity to determine in the first instance whether its existing rules . . . satisfy the requirements of due process, and whether to exercise its power to amend those rules to avoid potential constitutional challenges." *Id.* (citations omitted).

Because Petitioner has filed to preserve the federal question that it is now attempting to raise for the first time, this Court should deny his petition for writ of certiorari. Independent of the failure to preserve the issue, this Court should deny the

petition also because Petitioner has failed to justify stripping the states of their long-standing power to define and apply their own well-established laws relating to "judicial admissions."

CONCLUSION

For the reasons described above, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(717) 892-3000
Counsel for Respondent

RESPONDENT APPENDIX A

TARA L. JABLONSKI,	:	IN THE COURT OF
INDIVIDUALLY AND	:	COMMON PLEAS
AS ADMINISTRATRIX	:	LANCASTER
OF THE ESTATE OF	:	COUNTY,
MICHAEL L.	:	PENNSYLVANIA
JABLONSKI,	:	
DECEASED,	:	
PLAINTIFF	:	
	:	
V	:	CIVIL ACTION - LAW
	:	C.A. NO. CI-03-01733
RICHARD V. NOVAK	:	
AND PATRICIA NOVAK,:		JURY TRIAL
DEFENDANTS	:	DEMANDED

DEPOSITION OF: RICHARD V. NOVAK

TAKEN BY: PLAINTIFF

BEFORE: DIANE F. FOULTZ, RMR
NOTARY PUBLIC

DATE: SEPTEMBER 1, 2005, 8:58 A.M.

PLACE: RODA NAST, P.C.
801 ESTELLE DRIVE
LANCASTER, PENNSYLVANIA

APPEARANCES:

RODA NAST, P.C.
BY: ERIN C. BURNS, ESQUIRE

FOR – PLAINTIFF

THOMAS, THOMAS & HAFER, LLP
BY: C. KENT PRICE, ESQUIRE

FOR – DEFENDANTS

* * *

A And as the cattle truck came into the intersection or approached the intersection, he flowed right through, and I watched the black Volvo, and there was no slowing down. I didn't see any turn signal, and I assumed that she would flow through the intersection. Mr. Jablonski went from a standing position to a kneeling position within three feet of the road, and when he did, his stooping caught my attention, which my eyes went over to observe.

And when I looked back in front of me, I saw that there was only one car length now between me and the black Volvo, and I could – I perceived that the black Volvo had slammed its brakes on, at which point I went for my brake pedal as fast as I could and saw I was going to hit her, so I began swerving to the right thinking I'd maybe get stopped before I got to the PennDOT truck, but I was not able to.

Q Okay. So you hit your brakes?

A I went for the brakes, yes.

Q You went for the brakes. Did you – and you started to turn to the right –

A Correct.

Q – before you struck the back of the Volvo?

A Correct.

Q Okay. So you were partially turning when you hit the back of the Volvo?

A Yeah.

Q Do you remember what part of the Volvo you struck?

A It was the right rear.
Q Okay. And then you continued off to the right at which point you struck –
A Continued on and hit the left rear of the PennDOT truck, and the worker was pinched between my bumper and his bumper.
Q Okay. Do you remember anything else at all about the accident, anything you saw, anything else you did?
A Well, after the accident, you know, I wondered if the guy jumped out of the way or what happened. I didn't – you know, I couldn't see, and so my truck was partially stuck in gear, and I worked to get it into reverse and to back up a few feet, and then I got out of the truck and went around the front and I saw him laying on the highway, laying on the shoulder of the highway.
Q How close did you get to Mr. Jablonski?
A Maybe four feet.
Q Did you check for a pulse or see if he was breathing or anything like that?

A Well, he was cut in half in the area of his chest, and I figured that his heart would have been damaged, and I have never heard of anybody surviving when they have been cut in half, no.

* * *

RESPONDENT APPENDIX B

IN THE SUPERIOR COURT OF PENNSYLVANIA HARRISBURG DISTRICT

NO. 491 MDA 2007

TARA L. JABLONSKI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICAHEL L. JABLONSKI, DECEASED,

Appellees

v.

RICHARD V. NOVAK AND PATRICIA NOVAK,

Appellants

BRIEF OF APPELLANTS

Appeal from the Order of the Court of Common Pleas of Lancaster County, Pennsylvania, dated February 27, 2007 (docketed on February 28, 2007) docketed at CI-03-01733

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* * *

VII. ARGUMENT

A. DEFENDANTS ARE ENTITLED TO A NEW TRIAL DUE TO THE TRIAL COURT COMMITTING REVERSIBLE ERROR IN DENYING DEFENDANTS' MOTION TO PRECLUDE EVIDENCE OF PRIOR STATEMENTS BY RICHARD NOVAK'S CRIMINAL ATTORNEY DURING A PRELIMINARY HEARING, FOR FINDING THOSE STATEMENTS CONSTITUTED JUDICIAL ADMISSIONS, AND FOR DIRECTING A VERDICT IN FAVOR OF PLAINTIFF AS TO LIABILITY BASED ON SAME.

Based upon some statements made by Defendant Richard Novak's prior attorney during argument, at a preliminary hearing, in a criminal matter, the trial court in the instant matter took away from the jury the issue of negligence and causation, and instead, found as a matter of law, that Richard Novak was negligent and caused the

death of Plaintiff's decedent, Michael Jablonski. This was error on the part of the trial court and certainly affected the outcome of this case since Defendants never had the opportunity to present evidence as to the issues of negligence and/or causation. More importantly, the jury never had the opportunity to make a finding as to whether Defendant, Richard Novak, was negligent and caused the accident. Such error is not harmless and warrants this Court granting Defendants a new trial.

"A judicial admission is a formal waiver of proof that relieves an opposing party from having to prove the *admitted fact* and bars the party who made the admission from disputing it." *Reeder v. Workers' Comp. Appeal Bd. (Mercer Lime and Stone Co.)*, 871 A.2d 337, 340 (Pa. Commw. 2005) (emphasis added); *Katz v. Katz*, 163 A. 214, 216 (Pa. 1932); *Nasim v. Shamrock Welding Supply Co.*, 563 A.2d 1266, 1267 (Pa. Super. 1989), *appeal denied,* 577 A.2d 890 (Pa. 1990). "For an averment to qualify as a judicial admission, *it must be a clear and unequivocal* admission of ***fact***. Judicial admissions *are limited in scope to* ***factual matters*** otherwise requiring evidentiary proof, *and are exclusive of legal theories and conclusions of law.*" *John B. Conomos, Inc. v. Sun Co.*, 831 A.2d 696, 713 (Pa. Super. 2003), *appeal denied*, 845 A.2d 818 (Pa. 2004) (emphasis added). Moreover, an attorney's closing argument is not evidence. *See* Pennsylvania Standard Criminal Jury Instructions, 2.07; Pennsylvania Standard Civil Jury Instructions, 1.36.

In the instant case, Defendant Richard Novak's criminal defense attorney's statements, during a closing argument at a preliminary hearing, are not judicial admissions, and the trial court thus committed reversible error in denying Defendants' Motion in Limine on the issue and granting a directed verdict on the issue of liability to Plaintiff based on the alleged "judicial admissions". The criminal defense attorney for Defendant Richard Novak stated, in relevant part, during a closing argument at preliminary hearing arising out of a criminal charge related to the accident in question, as follows:

> I submit, your Honor, the Commonwealth has not shown that the defendant intentionally, knowingly, or recklessly caused the accident. In fact, quite to the contrary, the Commonwealth has shown that ***probably*** by inattentiveness ***the highest level*** they raise to is negligence. I would submit that their testimony doesn't even rise to criminal negligence in this case.
>
> * * *
>
> Now, the conduct that ***the Commonwealth*** has provided for the defendant through their expert and other witnesses is inattentiveness. He was inattentive. Now, basically it would sound that the inattentiveness was looking over at the PennDOT workers and then looking back at the roadway and suddenly realizing a vehicle was taking a left turn in front of him.
>
> * * *

There's certainly an argument that his driving was careless at this point. . .

(R. 299a) (emphasis added). Richard Novak's criminal defense attorney concluded his closing statement by stating:

> Again, under his standards the case means intentionally or knowingly or recklessly causes. To be constitutional, any one of those three levels of culpability must exist and in this situation, ***I submit the Commonwealth has shown***, quite to the contrary, that ***perhaps at best negligence exists*** but I would submit they haven't even shown criminal negligence, much less recklessness.

(R. 299a) (emphasis added).

The above statements by Defendant Richard Novak's criminal defense attorney are not "clear and unequivocal admissions of fact," and they are not judicial admissions. At best, read in their entirety, the statements of the criminal defense attorney amount to equivocal and ambiguous statements concerning Defendant Richard Novak's arguable negligence. Words to the effect of "probably," "perhaps at best," and "there's certainly an argument" are not clear and unequivocal as the use of such words is to qualify statements following the phrase.

Moreover, Defendant Richard Novak did not even testify at the preliminary hearing, and the statements by Defendant Richard Novak's criminal attorney do not even address facts, but rather are simply arguments concerning a legal conclusion. The criminal defense attorney was commenting,

during closing argument, on the evidence presented by the Commonwealth or lack thereof, not Defendant Richard Novak's testimony because he did not testify. In fact, three of the four comments by the criminal defense attorney are prefaced with "the Commonwealth has shown" or similar language.

The criminal defense attorney did not admit to any 'fact' in his closing argument, but rather was arguing how a District Justice should hold as a matter of law, i.e. a legal conclusion, concerning the fate of Defendant Richard Novak in a criminal proceeding. Simply put, the criminal attorney's statements are far from clear and unequivocal admissions of fact.

Plaintiff argued, and the trial court apparently incorrectly accepted, that Defendant Richard Novak "wants it both ways". The Plaintiff argued to the trial court that Richard Novak "wants to get out of the criminal case because he was only negligent but does not want that negligence admission and the finding of the criminal court to carry over to the civil side." Plaintiff's characterization of the criminal proceeding is misleading and lacks foundation.

Defendant Richard Novak never stated that he was negligent to avoid criminal prosecution. As previously stated, Defendant Richard Novak argued, via counsel, at the criminal proceeding that "the Commonwealth has shown that ***probably*** by inattentiveness" the accident occurred. (R. 299a) (emphasis added). Prior Counsel for Richard Novak also stated that "[t]here's certainly ***an argument*** that his driving was careless. . . ." (R. 299a)

(emphasis added). Additional, counsel for Richard Novak also stated that ". . . ***perhaps at best*** negligence exists but I would submit they haven't even shown criminal negligence, much less recklessness." (R 299a) (emphasis added).

Plaintiff mischaracterizes a description of evidence offered by the Commonwealth as an admission. Richard Novak's criminal counsel also explained that "the conduct that the Commonwealth ***has provided for*** the defendant ***through their expert and other witnesses*** is inattentiveness. He was inattentive." (R. 299a) (emphasis added). Richard Novak's criminal counsel was explaining that the Commonwealth's witnesses seemed to indicate that Richard Novak was "inattentive". Mr. Novak's counsel did not declare or admit that Richard Novak was "inattentive" by commenting on what the Commonwealth appeared to have offered into evidence. When coupled with counsel's statements regarding "probably by inattentiveness", "[t]here's certainly an argument that his driving was careless", and "perhaps at best negligence exists", no question is left that counsel for Defendant Richard Novak at the criminal proceeding did not make any factual declarations that Defendant Richard Novak was, in fact, negligent in causing the accident. Assuming *arguendo*, that an individual did have a question concerning what counsel for Defendant Richard Novak said at the preliminary hearing, a finding that criminal defense counsel's statements were judicial admissions is still unfounded because the statements are not clear and unequivocal admissions of fact. *See John B. Conomos, Inc.*, 831 A.2d at 713 (explaining that to qualify as a judicial

admission the statement "must be clear and unequivocal").

It further is anticipated that Plaintiff will incorrectly argue, as she did to the trial court, that collateral estoppel applies in the instant matter to preclude Defendant Richard Novak from contesting his alleged negligence in causing the accident. However, collateral estoppel applies only if:

> (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 954 (Pa. Super. 1992).

Plaintiff contends that the habeas corpus proceeding and decision rendered by the Honorable Judge Lawrence F. Stengel concerning Defendant Richard Novak's criminal case presents an estoppel issue precluding Defendant Richard Novak from contesting his alleged negligence in causing the automobile accident. Plaintiff's contention has no merit.[3]

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[3] Plaintiff's argument that "[t]he determination that Mr. Novak's actions constituted 'negligence' was essential to Judge Stengel's determination that the 'Commonwealth failed to

Collateral estoppel only serves to bar the re-litigation of issues that were previously adjudicated and were indispensable, material, and necessary to the prior determination. *Pilgrim Food Products Co. v. Filler Products, Inc.*, 143 A.2d 47, 49 (Pa. 1958); *Schoepple v. Lower Saucon Township Zoning Hearing Bd.*, 624 A.2d 699, 706 (Pa. Commw. 1993). Collateral estoppel does not apply to any incidental or collateral matters or to factual findings that are irrelevant to the determination or judgment. *Thal v. Krawitz*, 73 A.2d 376, 377 (Pa. 1950); *Atterberry v. Smith*, 522 A.2d 683, 687 (Pa. Commw. 1987).

In the instant matter, as noted by Judge Stengel in his Opinion, Defendant Richard Novak was charged with a criminal offense that required, at a minimum, a finding of recklessness to sustain a conviction. (R. 313a). Judge Stengel, in *dicta*, gratuitously opined that "[t]hese actions constitute mere negligence," in reference to Richard Novak's actions, but then properly concludes that his actions "do not rise to the level of recklessness." (R. 315a). As can be seen from Judge Stengel reasoning in his Opinion, whether Defendant Richard Novak's actions on the day of the accident were negligent or not was not even material to making the determination in the criminal case. (R. 308a-315a). In other words, whether Richard Novak was

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satisfy its burden of establishing the element of intentionally, knowingly or recklessly causing the accident that resulted in the death of the PennDOT worker in this case,'" it is utterly non-sequitar and argument ad ignoratium. Simply because the Commonwealth could not establish recklessness, does not establish that Defendant Richard Novak was negligent.

negligent was not material to or necessary for the determination of Richard Novak's entitlement to habeas corpus relief or his criminal culpability. In fact, Judge Stengel's references to "negligence" were irrelevant and incidental to the ultimate finding that Defendant Richard Novak was not reckless on the day of the accident. Simply put, whether Defendant Richard Novak was "reckless", was not and is not dependent on Richard Novak being found "negligent".

Furthermore, the issue to be decided in the prior case, the criminal case, was not identical to the one presented in the instant civil case. The criminal matter concerned itself with whether or not Defendant Richard Novak intended to cause the accident, knowingly caused the accident, or recklessly caused the accident, not whether Defendant Richard Novak was negligent in causing the accident.[4] No determination was ever made that Defendant Richard Novak was negligent. The only reference to negligence was that at most the Commonwealth's argument and witnesses testified that Defendant Richard Novak was negligent. Richard Novak, through his attorney, argued only that the testimony at the preliminary hearing, *at most*, amounted to negligence. Hence, collateral

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[4] It also should be noted that in order for collateral estoppel to apply Defendant Richard Novak must have had a full and fair opportunity to litigate the issue in the prior proceeding. As addressed above, Richard Novak did not have a full and fair opportunity to litigate "negligence" because negligence was not even an element of the offense he was charged with by the Commonwealth.

estoppel is not a bar to Defendant Richard Novak contesting negligence in the instant matter.

When the trial court permitted these alleged "judicial admissions" to become part of the record and to become conclusive evidence of Defendant Richard's negligence, the trial court prejudiced Defendants and committed an error of law. Defendants should at least have had the opportunity to present evidence and argument that Defendant Richard Novak was not negligent.

The trial court noted that "[t]hose statements and the evidence which had been elicited was clearly sufficient to support the entry of directed verdict." *See* p. 5 of Appendix "E". However, what the trial court ignores is the fact that a directed verdict is only permissible if the facts are clear and free from doubt, and that in determining same, the trial court must consider the facts in the light most favorable to the nonmoving party. *Lonasco*, 757 A.2d at 375. Defendants were entitled to have a jury make a determination as to these issues. To preclude Defendants from offering evidence to contradict Plaintiff's claim of negligence and causation, and direct a verdict in favor of Plaintiff as to same, based solely on a equivocal, legal argument, made by Defendant Richard Novak's criminal attorney in another matter, is an error in law that may only be remedied by granting Defendants a new trial.

* * *

RESPONDENT APPENDIX C

IN THE SUPERIOR COURT OF PENNSYLVANIA HARRISBURG DISTRICT

NO. 491 MDA 2007

TARA L. JABLONSKI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL L. JABLONSKI, DECEASED,

Appellees

v.

RICHARD V. NOVAK AND PATRICIA NOVAK,

Appellants

APPELLANTS' PETITION FOR *EN BANC* REARGUMENT BY THE COURT

Appeal from the Order of the Court of Common Pleas of Lancaster County, Pennsylvania, dated February 27, 2007 (docketed on February 28, 2007) docketed at CI-03-01733

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* * *

I. POINTS OF FACT OR LAW OVERLOOKED OR MISAPPREHENDED BY THE PANEL AND REASONS FOR REAGRUMENT

A. The panel's decision that statements made by Richard Novak's criminal defense attorney during argument at a preliminary hearing constituted "judicial admissions" and, therefore, Richard Novak was properly precluded from offering any evidence in defense of the allegations of liability in the civil case (App. A at 4-7), was based on (1) a misunderstanding of the facts of record surrounding the alleged judicial admissions and (2) a disregard of or misapplication of the law set forth by another panel of this Court in the case *John B. Conomos, Inc. v. Sun Co.*, 831 A.2d

696 (Pa. Super. 2003), *appeal denied*, 845 A.2d 818 (Pa. 2004).

As a consequence of the subject motor vehicle accident, Richard Novak was charged with violating 75 Pa.C.S.A. § 3742.1 of the Vehicle Code for causing Mr. Jablonski's death while driving with a suspended license, a felony of the third degree. Because that section of the Vehicle Code did not establish the degree of culpability necessary to establish a material element of the offense, attorney J. Richard Gray ("Attorney Gray"), on behalf of Richard Novak, argued at the preliminary hearing that Section 302(c) of the Crimes Code applied and, therefore, the Commonwealth had to prove Mr. Novak acted intentionally, knowingly or recklessly in order to make out a *prima facie* case. It was in this context of presenting a criminal defense that Attorney Gray argued that, *in the absence of any evidence having been advanced by Mr. Novak,* the very best the Commonwealth had proven was negligence but not intentional, knowing or reckless conduct. When examined in that context, *all* of Attorney Gray's arguments could be reasonably viewed as being prefaced parenthetically by the phrase "assuming for purposes of argument" or words of a similar import, which lawyers routinely employ when presenting arguments to courts.

The panel appears to have examined the alleged "factual" statements made by Attorney Gray without properly considering them within the actual context in which they were asserted. The statements which the panel accepted as "judicial

admissions" of liability binding upon Richard Novak, were made by Attorney Gray who argued during the criminal hearing that *the Commonwealth, at best, had only proven that Richard Novak was negligent*, and that such actions did not rise to the level necessary to constitute a crime, i.e. intentional, knowing or reckless conduct. A copy of the transcript from the criminal hearing is attached hereto as Appendix "C". Every single alleged "judicial admission" as to liability, to which the panel cited in its Memorandum Opinion, when read in light of the entire argument being made by Attorney Gray, was simply an *argument* and in no respect an admission of *fact*. *Compare* statements cited to by the panel on page six of its Memorandum Opinion, Appendix "A", to the actual transcript from the preliminary hearing, Appendix "C".

The panel also appears to have either misapplied or disregarded another panel's decision in the case *John B. Conomos, Inc.* v. *Sun Co.*, 831 A.2d 696 (Pa. Super. 2003), *appeal denied*, 845 A.2d 818 (Pa. 2004). In *John B. Conomos*, the panel, Judges Hudock, Lally-Green and Cavanaugh, held that a statement will not be considered a "judicial admission" unless it is a clear and unequivocal admission of ***fact***. *Id.* at 713. The panel in *John B. Conomos* explained what "clear" and unequivocal" meant by the following:

> Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and ***conclusions of law***. *Glick*, 458 F.2d at 1291. The fact must have been

unequivocally admitted and not be merely one interpretation of the statement that is purported to be the judicial admission. *Jones v. Constantino*, 429 Pa. Super. 73, 631 A.2d 1289, 1293-40 (Pa. Super. 1993) (finding no admission where "the evidence could be reasonably construed to admit of more than one meaning"); *see also Phila. Reinsurance Corp. v. Employers Ins. of Wausau*, 61 Fed. Appx. 816, 2003 U.S. App. LEXIS 6198 (3d Cir. 2003) ("An unequivocal statement is one that is clear, unambiguous and expresses only one meaning"); *Glick*, 458 F.2d at 1291; *The Doyle*, 105 F.2d 113, 117 (3d Cir. 1989) (holding that "admissions to be binding must be unequivocal, . . . and anyway *they may be disregarded in the interests of justice*"). An admission is not conclusively binding when the statement is indeterminate, inconsistent, or ambiguous. *Greater Valley Terminal Corp. v. Goodman*, 405 Pa. 605, 176 A.2d 408, 410 (Pa. 1962); *Dible v. Vagley*, 417 Pa. Super. 302, 612 A.2d 493, 499 (Pa. Super. 1992) (finding no admission in a statement in which "pronouns are burdened with ambiguous antecedents, and syntax is opaque" and that "to be an admission, a statement must at least be intelligible [and its] subject matter . . . readily determinable"); *Astrazeneca AB v. Mutual Pharm. Co.*, 250 F. Supp. 2d 506, 518 (E.D. Pa. 2003). When there is uncertainty surrounding a conceded fact, it is the role of the judge or jury as fact finder to determine which facts have been adequately proved and

> which must be rejected. *See Oscanyan v. Arms Co.*, 103 U.S. 261, 263-64, 26 L. Ed. 539 (1880).

Id. (emphasis added).

Although the panel in this case concluded that the statements made by Attorney Gray were "clear" and unequivocal", this conclusion is contrary to what the panel in *John B. Conomos* held ***must*** be demonstrated before a statement will be deemed "clear" and "unequivocal" and, thus, a "judicial admission". Every quote cited to by the panel in the instant appeal in support of its affirmation that Novak admitted liability in the criminal hearing is open to more than one reasonable interpretation. For example, the panel cites, "[n]ow, the conduct that the Commonwealth has provided for the defendant through their expert and other witnesses is inattentiveness. *He was inattentive.* (App. A at 6)(emphasis added by the panel). This quote can easily be interpreted to mean that Attorney Gray was commenting on *what the Commonwealth was arguing* through its witnesses – inattentiveness as compared to reckless or intentional conduct. In other words, Attorney Gray was merely saying that *for the purposes of argument* the most that the Commonwealth had proven was that Richard Novak was inattentive; this statement can in no way be interpreted as a "clear and unequivocal" admission of fact as to negligence or liability. Moreover, the quote "[n]ow this taken in simple terms, *he did, of course, cause an accident*" (App. A at 6)(emphasis added by panel), may be reasonably interpreted to mean nothing more than that Richard Novak caused

the accident without the statement constituting an admission of fault, i.e. negligence, inasmuch as causation does not equate to negligence. The mere happening of an accident is not evidence or proof of negligence. *Treadway v. Ebert Motor Co.*, 436 A.2d 994, 997-998 (Pa. Super. 1981). The same is true of the other citations on page six (6) of the panel's Memorandum Opinion.

The panel also failed to acknowledge the following comments by Attorney Gray which clearly show that his comments were equivocal, ambiguous and merely being offered as argument rather than admission:

1. "the Commonwealth has shown that ***probably*** by inattentiveness the highest level they raise [sic] to is negligence. I would submit that their testimony ***doesn't*** even rise to criminal negligence in this case." (App. C at 81)(emphasis added).

2. "the Commonwealth by the very fact they charged the defendant with careless driving shows his acts weren't reckless. They were careless. There's certainly ***an argument*** that his driving was careless at this point . . . ." (App. C at 82-83) (emphasis added).

3. "I submit the Commonwealth has shown, quite to the contrary, that ***perhaps at best*** negligence exists but I would submit they haven't even shown criminal negligence, much less recklessness." (App. C at 84)(emphasis added).

The other dispositive error made by the panel in deciding that the comments made by Attorney Gray constituted "judicial admissions" is that *almost every single statement referred to is an argument as*

to the law, not a fact. Only admissions of ***fact*** can be deemed "judicial admissions". *See John B. Conomos*, 831 A.2d at 713. The single quote cited to by the panel which can *arguably* relate to a factual admission is Attorney Gray's argument that "[i]t isn't a gross deviation from the standard of conduct that a person, reasonable person would observe in his situation. It is exactly what they said it was. Inattentiveness. He was inattentive. He was distracted, looked back and all of a sudden the vehicle was there and it was too late for him to do anything." (App. A at 6)(emphasis added). However, these comments made by Richard Novak's criminal defense attorney during argument are far from clear admissions of fact and can easily be interpreted in multiple ways. For example, read in the context within which they were made, these statements can reasonably be interpreted to convey, at the most, negligence on the part of Mr. Novak, which was simply not enough to convict. It is also far from evident that a simple statement, by itself, of inattentiveness, without any opportunity to explain the reason for the alleged inattentiveness, can be equated with a factual admission strong enough to support a legal admission of negligence. As the panel in *John B. Conomos* emphasized, when in doubt, the statement should not be deemed a "judicial admission". *Id.*

The isolated statements that the panel found to be "judicial admissions" of liability are grossly inadequate to constitute "clear" and "unequivocal" statements of ***fact*** as required in the case of *John B. Conomos, supra.* The panel's failure to recognize that the statements made by Attorney Gray in the

criminal hearing were merely by way of argument, ambiguous and, at best, open to more than one reasonable interpretation, deprived Richard Novak of his right and opportunity to defend himself against the allegations of liability during the civil trial of this matter. Attorney Gray simply was arguing what criminal defense attorneys argue on a daily basis, i.e. that although the Commonwealth may have produced evidence of a lesser standard, i.e. negligence, it did not produce evidence to meet the higher burden of proof in a criminal case. Because of the purported "judicial admissions" of liability, the trial court improperly denied Novak of his "day in court" and usurped the jury's role as the sole fact finder.

The panel's decision is contrary to the facts of record and this Court's prior decisions, including *John B. Conomos, supra,* and therefore, Defendants respectfully request that this Court grant *en banc* reargument as to this issue.

* * *

III. CONCLUSION

The panel of this Honorable Court considered the statements made by Richard Novak's criminal defense attorney during argument in a criminal hearing, out of their proper context, and found them to be "judicial admissions" as to liability. This finding by the panel disregarded another panel's decision in which it was explained that for a statement to be considered a "judicial admission", it must be as to a fact, and not be open to more than one reasonable interpretation, i.e. "clear" and

unequivocal". This finding by the panel essentially deprived Richard Novak of the opportunity to defend himself as to the allegations of liability asserted by Plaintiffs. Whether or not such a defense would have been successful is not relevant, but rather, what is important is that Defendants were denied this right based on ambiguous statements that under no circumstances should have been construed to be "judicial admissions" as to liability.

* * *

RESPONDENT APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
NO._____

TARA L. JABLONSKI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICAHEL L. JABLONSKI, DECEASED,

Respondents

v.

RICHARD V. NOVAK AND PATRICIA NOVAK,

Petitioners

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal by Richard V. Novak and Patricia Novak from a final Order of the Superior Court dated July 2, 2008, at Docket No. 491 MDA 2007, which affirmed the Order of the Court of Common Pleas of Lancaster County, Pennsylvania, dated February 27, 2007, (docketed on February 28, 2007) docketed at CI-03-01733

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* * *

V. CONCISE STATEMENT OF THE REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

A. The Superior Court's decision that statements made by Richard Novak's criminal defense attorney during argument at a preliminary hearing constituted "judicial admissions", despite those statements not being clear and unequivocal, so that Defendants were denied the right to defend themselves against the allegations of liability in this case, is in direct conflict with well-established law in this jurisdiction, and is such a departure from accepted application of the law regarding "judicial

admissions", as to call for the exercise of this Court's supervisory authority.

In this case, the Superior Court panel's interpretation of the law as to "judicial admissions" is inconsistent with, and contrary to, well-established precedent and resulted in Defendants being deprived of the opportunity and right to defend themselves against allegations of negligence. This Court should accept review in order to clarify or re-emphasize the importance of statements of fact needing to be unequivocal and clear in order to be considered "judicial admissions". Otherwise, litigants are deprived of the right to have their "day in court", simply because of *arguments* made in other proceedings.

A "judicial admission" is a device by which a trial may be expedited by elimination of the need for proof as to certain issues. *Durkin v. Equine Clinics, Inc.*, 546 A.2d 665, 669 (Pa. Super. 1988), *appeal denied*, 569 A.2d 1367 (Pa. 1989). A "judicial admission" is in essence a confession, concession, waiver or stipulation by a party, and as such, that party is not permitted to explain or contradict the "admission". *Id.* at 670. As such, common sense dictates, and our appellate courts have required, that in order for a statement to be deemed a confession or stipulation, it must be clear and unequivocal. *John B. Conomos, Inc. v. Sun Co.*, 831 A.2d 696 (Pa. Super. 2003), *appeal denied*, 845 A.2d 818 (Pa. 2004). (App. E).

In *John B. Conomos*, a panel of the Superior Court correctly held that a statement will not be

considered a "judicial admission" unless it is a clear and unequivocal admission of ***fact***. *Id.* at 713. The panel in *John B. Conomos* explained what "clear" and "unequivocal" meant by the following:

> Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and ***conclusions of law***. *Glick*, 458 F.2d at 1291. The fact must have been unequivocally admitted and not be merely one interpretation of the statement that is purported to be the judicial admission. *Jones v. Constantino*, 429 Pa. Super. 73, 631 A.2d 1289, 1293-40 (Pa. Super. 1993) (finding no admission where "the evidence could be reasonably construed to admit of more than one meaning"); *see also Phila. Reinsurance Corp. v. Employers Ins. of Wausau*, 61 Fed. Appx. 816, 2003 U.S. App. LEXIS 6198 (3d Cir. 2003) ("An unequivocal statement is one that is clear, unambiguous and expresses only one meaning"); *Glick*, 458 F.2d at 1291; *The Doyle*, 105 F.2d 113, 117 (3d Cir. 1989) (holding that "admissions to be binding must be unequivocal, . . . and anyway *they may be disregarded in the interests of justice*"). An admission is not conclusively binding when the statement is indeterminate, inconsistent, or ambiguous. *Greater Valley Terminal Corp. v. Goodman*, 405 Pa. 605, 176 A.2d 408, 410 (Pa. 1962); *Dible v. Vagley*, 417 Pa. Super. 302, 612 A.2d 493, 499 (Pa. Super. 1992) (finding no admission in a statement in which "pronouns are burdened with ambiguous

> antecedents, and syntax is opaque" and that "to be an admission, a statement must at least be intelligible [and its] subject matter . . . readily determinable"); *Astazeneca AB v. Mutual Pharm. Co.*, 250 F. Supp. 2d 506, 518 (E.D. Pa. 2003). When there is uncertainty surrounding a conceded fact, it is the role of the judge or jury as fact finder to determine which facts have been adequately proved and which must be rejected. *See Oscanyan v. Arms Co.*, 103 U.S. 261, 263-64, 26 L. Ed. 539 (1880).

Id. (emphasis added).

Here, despite citing to the case *John B. Conomos*, above, the Superior Court panel did not follow the law in that case in determining that statements made by Richard Novak's criminal defense attorney during argument are "judicial admissions". The panel appears to have examined the alleged "factual" statements made by Richard Novak's criminal defense attorney J. Richard Gray ("Attorney Gray"), without properly considering them within the actual context in which they were asserted. When considered within the actual context in which they were made, the statements which were deemed to have been "judicial admissions", really are far from "confessions" or "stipulations".

The statements, which the panel accepted as "judicial admissions" of liability binding upon Richard Novak, were made by Attorney Gray who argued during a criminal hearing that *the Commonwealth, at best, had only proven that Richard Novak was negligent,* and that such actions

did not rise to the level necessary to constitute a crime, i.e. intentional, knowing or reckless conduct. (App. D). Every single alleged "judicial admission" as to liability, to which the panel cited in its Memorandum Opinion, when read in light of the entire argument being made by Attorney Gray, was simply an *argument* and in no respect an admission of *fact*. (*Compare* statements cited to by the panel on page 6 of its Memorandum Opinion, Appendix B, to the actual transcript from the preliminary hearing, Appendix D).

Specifically, the statements were made during a criminal proceeding which was a consequence of the subject motor vehicle accident at issue. Defendant Richard Novak, was charged with violating 75 Pa.C.S.A. §3742.1 of the Vehicle Code for causing Mr. Jablonski's death while driving with a suspended license, a felony of the third degree. Because that section of the Vehicle Code did not establish the degree of culpability necessary to establish a material element of the offense, Attorney Gray, on behalf of Richard Novak, argued at the preliminary hearing that Section 302(c) of the Crimes Code applied and, therefore, the Commonwealth had to prove Mr. Novak acted intentionally, knowingly or recklessly in order to make out a *prima facie* case. 18 Pa.C.S. §302(a). It was in this context of presenting a criminal defense that Attorney Gray argued that, *in the absence of any evidence having been advanced by Mr. Novak*, the very best the Commonwealth had proven was negligence, but not intentional, knowing or reckless conduct. When examined in that context, *all* of Attorney Gray's arguments could be reasonably

viewed as being prefaced parenthetically by the phrase "assuming for purposes of argument" or words of a similar import, which lawyers routinely employ when presenting arguments to courts.

Although the panel in this case concluded that the statements made by Attorney Gray were "clear" and "unequivocal", this conclusion is contrary to what the panel in *John B. Conomos* held ***must*** be demonstrated before a statement will be deemed "clear" and "unequivocal" and, thus, a "judicial admission". Every quote cited to by the panel in the instant appeal in support of its affirmation that Richard Novak admitted liability in the criminal hearing is open to more than one reasonable interpretation.

For example, the panel cites, "[n]ow, the conduct that the Commonwealth has provided for the defendant through their expert and other witnesses is inattentiveness. *He was inattentive.*" (App. B at 6) (emphasis added by panel). This quote can easily be interpreted to mean that Attorney Gray was commenting on *what the Commonwealth was arguing* through its witnesses – inattentiveness as compared to reckless or intentional conduct. In other words, Attorney Gray was merely saying that *for the purposes of argument* the most that the Commonwealth had proven was that Richard Novak was inattentive; this statement can in no way be interpreted as a "clear and unequivocal" admission of fact as to negligence or liability.

Moreover the quote "[n]ow this taken in simple terms, *he did, of course, cause an accident*" (App. B at 6) (emphasis added by panel), may be

reasonably interpreted to mean nothing more than that Richard Novak caused the accident, without the statement constituting an admission of fault, i.e. negligence, inasmuch as causation does not equate to negligence. The mere happening of an accident is not evidence or proof of negligence. *Treadway v. Ebert Motor Co.*, 436 A.2d 994, 997-98 (Pa. Super 1981). The same is true of the other citations on page 6 of the panel's Memorandum Opinion. (App. B at 6).

The panel also failed to acknowledge the following comments by Attorney Gray which clearly show that his comments were equivocal, ambiguous and merely being offered as argument rather than admission:

1. "the Commonwealth has show that ***probably*** by inattentiveness the highest level they raise [sic] to is negligence. I would submit that their testimony ***doesn't*** even rise to criminal negligence in this case." (App. D at 81) (emphasis added).
2. "the Commonwealth by the very fact they charged the defendant with careless driving shows his acts weren't reckless. They were careless. There's certainly ***an argument*** that his driving was careless at this point . . . ." (App. D at 82-83) (emphasis added).
3. "I submit the Commonwealth has shown, quite to the contrary, that ***perhaps at best*** negligence exists but I would submit they haven't even shown criminal negligence, must less recklessness." (App. D at 84) (emphasis added).

The Superior Court panel's decision that the statements made by Attorney Gray were "judicial admissions" also was contrary to well-settled law because *almost every single statement referred to by Attorney Gray was an argument as to the law, not a fact.* Only admissions of ***fact*** can be deemed "judicial admissions". *John B. Conomos*, 831 A.2d at 713. The single quote cited to by the panel which can *arguably* relate to a factual admission is Attorney Gray's argument that "[i]t isn't a gross deviation from the standard of conduct that a person, reasonable person would observe in his situation. It is exactly what they said it was. Inattentiveness. He was inattentive. He was distracted, looked back and all of a sudden the vehicle was there and it was too late for him to do anything." (App. B at 6) (emphasis added).

These comments made by Richard Novak's criminal defense attorney during argument are far from clear admissions of fact and can easily be interpreted in multiple ways. For instance, read in the context within which they were made, these statements can reasonably be interpreted to convey, at the most, negligence on the part of Mr. Novak, which was simply not enough to convict. It also is far from evident that a simple statement, by itself, of inattentiveness, without any opportunity to explain the reason for the alleged inattentiveness, can be equated with a factual admission strong enough to support a legal admission of negligence. As the Superior Court in *John B. Conomos* emphasized, *when in doubt, the statement should not be deemed a "judicial admission". Id.* (emphasis added).

The isolated statements that the panel found to be "judicial admissions" of liability are grossly inadequate to constitute "clear" and "unequivocal" statements of ***fact*** as required in the case of *John B. Conomos*, above. The panel's failure to recognize that the statements made by Attorney Gray in the criminal hearing were merely by way of argument, ambiguous and, at best, open to more than one reasonable interpretation, deprived Richard Novak of his right and opportunity to defend himself against the allegations of liability during the civil trial of this matter. Attorney Gray simply was arguing what criminal defense attorneys argue on a daily basis, i.e. that although the Commonwealth may have produced evidence of a lesser standard, i.e. negligence, it did not produce evidence to meet the higher burden of proof in a criminal case. Because of the purported "judicial admissions" of liability, the trial court improperly denied Mr. Novak his "day in court" and usurped the jury's role as the sole fact finder.

It is submitted that this Court should accept review in order to address the Superior Court panel's serious deviation from well-settled law as to a legal rule, "judicial admissions", which if not applied very narrowly and conservatively, robs litigants of their right to defend themselves. This type of expansion of a narrow rule of law by our appellate courts negatively impacts future litigants, also, since this issue is likely to be raised on future appeals in other cases.

For these reasons, Defendants respectfully request that this Court accept review of the issue of

the limits and scope of the rule of "judicial admissions".

* * *